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December 15, 2006

Via Telecopier at (202) 632-0045*
Hon. Philip N. Hogen, Chairman
Hon. Cloyce V. Choney, Commissioner
National Indian Gaming Commission
1441 L Street, NW, Suite 9100
Washington, D.C. 20005

Re: Supplemental Comments of Miccosukee Tribe of Indians of Florida Concerning Proposed Rules on Class II Definitions, Class II Classification Standards, and Class II Technical Standards; Comments Concerning "Economic Impact Studies"

Dear Chairman Hogen and Commissioner Choney:

On behalf of our client, the Miccosukee Tribe of Indians of Florida ("Tribe"), we write to you as representatives of the federal government of the United States of America regarding the proposed regulations by the National Indian Gaming Commission ("Commission" or "NIGC") on the Definition for Electronic or Electromechanical Facsimile, published at 71 Fed. Reg. 30232 (May 25, 2006) ("Definition Regulations"), and Classification Standards for Bingo, Lotto, Other Games Similar to Bingo, Pull Tabs and Instant Bingo as Class II Gaming when Played Through an Electronic Medium using "Electronic, Computer, or other Technologic Aids," published at 71 Fed. Reg. 30238 (May 25, 2006) ("Classification Regulations," individually and collectively with the Definition Regulations, the "Proposed Rule"). We also write to you regarding the proposed regulations by the Commission on the Technical Standards for "Electronic, Computer, or Other Technologic Aids" Used in the Play of Class II Games, published at 71 Fed. Reg. 46336 (August 11, 2006) (the "Technical Standards Regulations, individually and collectively with the Proposed Rule, the "Proposed Regulations").

By prior letter of August 15, 2006 ("August Letter"), the Tribe through its counsel provided preliminary comments to the Proposed Rule. By comments by letter of November 15, 2006 ("November Letter"), the Tribe through its counsel supplemented the preliminary comments submitted for the Tribe to the Proposed Rule and also provided preliminary comments to the Technical Standards Regulations and on the Commission's Tribal Advisory Committee ("Advisory Committee").

By this letter, we wish to further supplement[1] the preliminary comments submitted for the Tribe to the Proposed Regulations and with respect to the Commission's Advisory Committee process. We also wish to provide preliminary comments regarding the Commission's apparent efforts to analyze the regulatory impact of the Proposed Rule by two studies: (a) A. Meister, Analysis Group, *The Potential Economic Impact of Proposed Changes to Class II Gaming Regulations* (November 3, 2006) ("Meister Report"); and, (b) BMM North America, Inc., *Comparison Analysis of Various Class II Configuration Options* (October 26, 2006) ("BMM Report").[2]

The Tribe reserves the right to supplement, or to revise, its positions stated in the enclosed comments whether through additional written comments to the Commission or on review of any final rule.

I. The Commission's Rulemaking Process has Prejudiced the Tribe's Ability to Participate Meaningfully in the Commission's Rulemaking Process.

The manner of presentation by the Commission of the Proposed Regulations has made and continues to make it difficult for the Tribe to provide comments or to participate in the Commission's rulemaking process.[3] The manner of presentation of the Proposed Regulations and the manner by which the

[1] The discussion in this correspondence adds to the comments previously submitted by the Tribe, including through its counsel, regarding the Proposed Regulations. As necessary, we will refer to the discussion and authorities submitted in comments to the NIGC in the Tribe's August Letter and November Letter (and correspondence submitted to the NIGC during the NIGC's Advisory Committee process), which prior comments, discussion, and authorities are incorporated herein for all purposes.

[2] *See* Proposed Rule; Notice of Availability, 71 Fed.Reg. 66147 (November 13, 2006).

[3] As stated in the Tribe's November Letter, the NIGC's presentation of the Proposed Rule, as overlapping rulemaking efforts (which the NIGC treated as one rulemaking through its Advisory Committee process as discussed in the Tribe's prior comments), with long, detailed proposed regulatory provisions, and accompanied by a long, varied notice as to the NIGC's apparent stated rationale for the rule, involves countless issues relating to the regulation of tribal gaming. The Proposed Rule by itself goes to important issues relating to the jurisdiction of tribal governments with respect to tribal gaming, the jurisdiction of the Secretary and the various states as to class III gaming, and detailed substantive and technical aspects of games played as class II gaming.

At the same time, the NIGC has proposed very detailed technical standards for equipment used with class II gaming through the Technical Standards Regulations. The issues raised by the Technical Standards Regulations are intertwined with the Proposed Rule. The NIGC treated the Technical Standards Regulations with the Proposed Rule as one rulemaking through its Advisory Committee process. The NIGC itself apparently still treats these matters as one issue by posting the Technical Standards Regulations on the same web page as the Proposed Rule.

We understand that the NIGC held a public hearing in Washington, D.C., on September 19, 2006, concerning only the Proposed Rule. *See* Notice of Public Hearing, etc., 71 Fed.Reg. 44239 (August 4, 2006) (the "Notice"). We appreciate the NIGC's efforts to post on its website materials related to the Public Hearing and the Proposed Regulations. However, the extent of the record is unclear and we undertake no obligation to comment on the record, again, unclear such as it is, from the public hearing and relating to the Proposed Regulations. Although raised in our November Letter, the NIGC has not cured these infirmities in the record or in its rulemaking process.

Commission has successively re-opened the comment period on the Proposed Regulations, for abbreviated time-periods, but without advance notice or substantial ability of tribal governments to review additional materials or alternatives apparently under consideration by the Commission in connection with the Proposed Regulations, renders the Commission's rulemaking process arbitrary, capricious, contrary to law, and otherwise defective.[4] The Tribe is further concerned about the apparent lack of transparency associated with the current rulemaking process.

The Commission at a purported meeting with the Advisory Committee[5] in Washington, D.C., on December 5, 2006, presented a "hypothetical"[6] alternative to the Proposed Rule.[7] At that meeting of the

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The form of the presentation by the NIGC as to the Proposed Rule, with the intertwined Technical Standards Regulations, makes it difficult, if not impossible, to ascertain the NIGC's intentions as to new regulations, to present comments on the issues raised by the NIGC in the Proposed Regulations, or to participate effectively in the NIGC's rulemaking process. This difficulty extends to any alternative that the NIGC may pursue in response to comments received by the NIGC on the Proposed Regulations. Because of the manner and method of the NIGC's presentation as to the Proposed Regulations, collectively and individually, we believe that as to any final rule adequate notice would not have been given by the NIGC with respect to any deviation as to the overall framework of the Proposed Regulations, or as to individual substantive provisions of the Proposed Regulations. *See United States v. Florida East Coast Railway Co.*, 410 U.S. 224, 243 (1973) (stating that notice of a proposed action must fairly advise the public of "exactly what" the agency proposes to do); *McLouth Steel Prods. Corp. v. Thomas*, 838 F.2d 1317, 1322-23 (D.C. Cir. 1988) (finding inadequate notice because the "summary" did not make reference to the model the agency adopted). Otherwise, the NIGC would essentially be violating the logical outgrowth rule.

[4] Tribal governments were initially told by the NIGC that the comment period for the Proposed Regulations would not be extended past the prior deadline of November 15, 2006. Many tribal governments scrambled to provide comments by the NIGC's "deadline" and as best as such comments could be assembled given the manner of presentation by the NIGC of the voluminous Proposed Regulations. Apparently, the NIGC's publicly stated position in November of a firm date was not absolute as we see from the NIGC's website the posting of comments received from at least one tribal government after November 15, 2006, and prior to the NIGC re-opening the comment period for the Proposed Regulations on or about December 4, 2006. We learned only on December 14, 2006, that the NIGC apparently intends to extend the comment period for the Technical Standards Regulations but not for the Proposed Rule even though the various proposed rules are intertwined and overlap. Our objection to the NIGC's re-opening of the comment period is not as to the fact that the period was re-opened but as to the procedures used in that regard.

[5] At the Advisory Committee meeting on December 5, 2006, Chairman Hogen apparently stated during his opening remarks that "an appointment was expected any day" with respect to the "Nelson Westrin's position on the NIGC" but no further clarification or disclosure was made. We were surprised to learn that evening after the conclusion of the Advisory Committee meeting that Norman DesRosiers, who had participated as a tribal representative on the Advisory Committee that very day, had been selected by the Secretary for appointment to the NIGC. The Tribe does not comment at this point on the proposed appointment of Mr. DesRosiers. However, the lack of disclosure of Mr. DesRosiers' impending appointment, at the same time as Mr. DesRosiers participated in the Advisory Committee and ostensibly was providing comments to the NIGC *on behalf of tribal governmental interests*, causes concern over the transparency of the NIGC's rulemaking process as to the Proposed Regulations. Additionally, excluding Mr. DesRosiers as a *tribal* representative of the Advisory Committee would effectively mean that only three of the original seven members selected by the NIGC as tribal representatives on the Advisory Committee in fact attended the December 5, 2006, meeting of the "Advisory Committee." As to the members of the Advisory Committee that attended the December 5, 2006, meeting, none of the "tribal representatives" were representative of tribal governments engaged solely in class II gaming operations with a present intention to remain solely as a class II gaming operation.

Advisory Committee, the Commission further supported[8] the creation of a vendor's task-force to provide input into the Technical Standards Regulations. Apparently, a meeting of various representatives of various manufacturers of class II gaming equipment[9] in fact occurred with representatives of the Commission at the "hidden valley ranch,"[10] in Las Vegas, Nevada, over December 11-13, 2006. At the

[6] The NIGC has couched the apparent alternative as a "hypothetical" but substantial portions of the December 5, 2006, meeting of the Advisory Committee were devoted to discussing the alternative suggesting that the "hypothetical" is much more than a mere speculative exercise by the NIGC. Yet, the Tribe is not aware of any drafts of alternate language to the Proposed Regulations incorporating the "hypothetical" alternate. Tribal governments are precluded from providing comments in the rulemaking process under the present circumstances of notice and disclosure of the details having not been made by the NIGC as to the alternatives under consideration by the NIGC with respect to the Proposed Regulations. Different or additional comments would likely have been submitted to the Proposed Regulations if such notice and disclosure had been made. In fact, the Tribe reserves its right to submit different or additional comments if the proposed rule is replaced with the hypothetical or other alternative.

[7] *See* NIGC Chart, Hypothetical Alternative to Proposed Regulations, Classification Advisory Committee Meeting, Washington, D.C., December 5-6, 2006, available at http://www.nigc.gov/Portals/0/NIGC%20Uploads/classiigmeclasfnstds/advisorycommittee/clasfctnadvrycomtemtgcht.pdf (website last visited December 14, 2006). The link on the NIGC's website to the hypothetical alternative is entitled "Tribal Advisory Chart" making it unlikely that tribal governments in general would be aware of the fact or existence of the hypothetical alternative apparently being considered by the NIGC with respect to the Proposed Rule thereby depriving tribal governments of effective consultation or an opportunity to provide comments and to participate in any meaningful fashion in the NIGC's instant rulemaking process. Further, the "Tribal Advisory Chart" posted on the NIGC's website does not appear to disclose all of the matters alluded to by the NIGC at the Advisory Committee meeting on December 5, 2006.

[8] Apparently there was discussion by the NIGC's representatives at the Advisory Committee meeting that the NIGC could not "officially support" such a manufacturer's task force in the context of a federal advisory committee and yet the NIGC *at the same time* offered to have its representatives attend the meeting of the manufacturer's task force and to consider alternatives developed by the task force and the NIGC's representatives. Although the efforts of the manufacturer's task force may well yield beneficial and much needed improvements to the Proposed Regulations (putting aside the serious and very real questions as to the NIGC's authority to promulgate such regulations), such a process must be open and transparent and provide adequate notice and opportunity to participate by all affected tribal governments. The current situation provides no such procedural assurances.

[9] Representatives of both BMM Testlabs, Inc., and Nova Gaming LLC, apparently attended the meeting of the manufacturer's representatives. BMM Testlabs apparently continues to represent the NIGC in connection with the rulemaking process as to the Proposed Regulations (a representative of the BMM Testlabs apparently attended the Advisory Committee meeting on December 5, 2006, on behalf of the NIGC). At the same time, Nova Gaming is a known provider of class II gaming equipment. *See* NIGC Letter re Classification, Nova Gaming Bingo System 4.2.5.9 (August 25, 2005) (referring to the fact that in connection with the issuance of a game classification advisory opinion that the Commission had "reviewed a report from BMM test labs"); *see also* http://www.novagamingllc.com/index.php?option=com_content&task=blogsection&id=5&Itemid=51 (website last visited December 14, 2006) (listing class II games provided by Nova Gaming as Reels of Fire and LiveWire). BMM Testlabs continues to list Nova Gaming as a principal client reference. *See* http://www.bmm.com/business/references/ client_references.htm#NovaGaming (website last visited December 14, 2006).

[10] Our apologies to the proprietor of the Green Valley Ranch Resort, but our context is perhaps apt given a meeting of apparent significance in which vested tribal rights and interests were apparently being negotiated with game manufacturers but for which no notice was given to tribal governments in general and which occurred off the beaten path and far from the location of most tribal governments. We are confident that established principles of administrative law do not envision or sanction such secrecy in a rulemaking process.

meeting with the manufacturers, substantial revisions were apparently made to or considered with respect to the Technical Standards Regulations. Given the lack of transparency, we do not know if, or what, changes to the Proposed Rule were also discussed at the manufacturer's meeting with the representatives of the NIGC or are being considered by the NIGC. Additionally, the lack of disclosure as to the changes discussed as to the Technical Standards Regulations directly prejudices the ability of commenters to provide input on the intertwined and overlapping Proposed Rule.

The Commission's proposed alternative to the Proposed Rule apparently includes other matters not made available by the Commission to the Tribe in specific, or to other tribal governments, in general. Significantly, the Commission's proposed alternative apparently includes certain grandfather provisions[11] and a right of objection for state governments[12] to certifications obtained by tribal governments and others regarding compliance with the Proposed Rule.

The Tribe cannot effectively comment on these proposals in the absence of notice by the Commission as to the substance of the proposals apparently now contemplated by the Commission in connection with the Proposed Regulations. A fair question exists as to what is the record on which comments should be submitted by interested parties, or on which judicial review may subsequently be had, with respect to the NIGC's Proposed Regulations. Respectfully, the Commission appears to be well down the road towards creating one administrative record for the public . . . and another for the Commission.

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[11] The question of grandfather provisions raises important questions as to the Tribe's rights. The Tribe is forced to speculate as the NIGC has not given notice as to the alternatives being considered. However, under the Definition Regulations, the NIGC seeks contrary to the Indian Gaming Regulatory Act ("IGRA") an overbroad definition of "facsimile." The NIGC then would purport to provide a carve-out from the NIGC's definition of facsimile for games meeting the NIGC's arbitrarily limited definitions of allowed class II gaming in its proposed part 546 in the Classification Regulations. The grandfather provisions alluded to by the NIGC at the Advisory Committee meeting on December 5, 2006, appear to refer only to the implementation of the Classification Regulations effectively creating an inherent conflict between the NIGC's Definition Regulations and Classification Regulations.

[12] As discussed in the Tribe's November Letter, short of a complete ban of all gaming, states have no role under the IGRA with respect to class II gaming. Further, the manner by which the Chairman of the NIGC can effectively object at any time to a certification received by a tribal government under the Proposed Rule means that a tribal government in one state will likely be subject to repeated challenges to its certification, not only as to the certification received by the tribe, but to certifications received by other tribal governments in that state and in other states. The addition of a right of objection by state governments would likely mean that the tribal government would further be subject to objections not only from the state in which the tribe is located but also to objections raised by other states as well. Among other issues, and again the Tribe is forced to speculate as the NIGC has not given notice as to the alternatives being considered, a tribal government having received a certification may likely have no ability to participate in the appeals process of an objection to a certification received by other tribal governments some of which may not even be located within the same state. Again, as stated in the Tribe's November Letter, the Proposed Rule is arbitrary, capricious and contrary to law. The importance of the issues raised by the apparent alternatives now under consideration by the NIGC but for which the Tribe is effectively precluded from participating in the discussion by a lack of notice demonstrates the prejudice to the Tribe as to the NIGC's rulemaking process.

II. The Commission's Regulatory Impact Analysis Understates the Impacts of the Proposed Regulations.

The Meister Report makes a number of unsupported or non-relevant assumptions in reaching its conclusions as to the likely impacts of the Proposed Rule, including but not limited to the following:

The Meister Report fails to consider the correlative and additive impacts of the Technical Standards Regulations when viewed with the impacts of the Proposed Rule. The Technical Standards Regulations are intertwined with the Proposed Rule. As discussed in the Tribe's November Letter, the Proposed Rule would purport to limit dramatically class II gaming and, then, the Technical Standards Regulations would essentially eliminate the remainder of technology available to tribal governments for use with class II gaming.

The Meister Report includes an unsupported assumption that "Tribes with a viable alternative to Class II machines (e.g., Class III machines) would not be likely to suffer losses in gaming revenue." Meister Report, *supra*, at ii. Congress did not intend that tribal governments would lose their rights (as proposed by the Commission in the Proposed Rule) to engage in class II gaming (as such class II gaming is in fact defined and recognized by Congress in the IGRA) merely because a tribe could agree to a compact or obtain Secretarial procedures.[13] The *context* of class II gaming rights, which recognizes tribal primary jurisdiction of that gaming subject to limited oversight by the Commission, as provided in the IGRA, is not equivalent to class III gaming which likely requires more invasive intrusions to tribal jurisdiction through the compacting or Secretarial procedures process. Thus, the assumption that tribes in certain states, *e.g.*, California, Florida, Oklahoma, *etc.*, have a "viable alternative" to class II gaming, *i.e.*, class III machines, is unfounded. A number of tribal governments may choose to engage in class II gaming alone, without engaging in the transfer of jurisdiction (and often outright taxation through revenue sharing provisions) involved with a tribal-state compact, because tribal governments do not equate jurisdiction/sovereignty with dollars. Or stated another way, the Proposed Regulations imply that tribal governments are free to keep their sovereignty and jurisdiction intact, by foregoing a compact or Secretarial procedures, so long as tribal governments are satisfied with being less well off financially than was intended by Congress in the definitions provided by Congress in the IGRA for class II gaming.

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[13] *See* S.Rep. No. 446, 100th Cong., 2d Sess., *reprinted in*, 1988 U.S. Code Cong. & Ad. News 3071, 3075-3076 ("Senate Report") (". . . the Committee has developed a framework for the regulation of gaming activities on Indian lands which provides that in the exercise of its sovereign rights, unless a tribe affirmatively elects to have State laws and State jurisdiction extend to tribal lands, the Congress will not unilaterally impose or allow State jurisdiction on Indian lands for the regulation of Indian gaming activities . . . it is the Committee's intent that to the extent tribal governments elect to relinquish rights in a tribal-State compact that they might otherwise have reserved, the relinquishment of such rights shall be specific to the tribe so making the election, and shall not be construed to extend to other tribes, or as a general abrogation of other reserved rights or sovereignty").

> The Meister Report uses "MegaMania as a benchmark for performance of Class II machines under the proposed regulation changes," Meister Report, *supra*, at ii, and yet not even MegaMania would likely remain compliant with the Proposed Rule.
>
> The Meister Report appears premised on an assumption that the current state of the tribal Class II gaming industry constitutes the baseline against which the regulatory impact of the Proposed Regulations should be measured. However, as discussed in the Tribe's comments previously, the Commission has for some time sought to limit the definitions of class II gaming beyond the simple and straightforward statutory limits imposed by Congress. As a result, the starting baseline for the size of the class II gaming industry is already less than what Congress reasonably intended for class II gaming and the impacts identified in the Meister Report are understated.

As evidenced by the Meister Report and the BMM Report, the Proposed Regulations individually and collectively represent: (a) a "significant economic effect on a substantial number of small entities," (b) a "major rule" having an annual economic effect on the economy of more than $100 million, and, (c) a "significant regulatory action" imposing annual costs on tribal governments of more than $100 million.

III. Conclusion.

The Proposed Rule (Definition Regulations and Classification Regulations) are intertwined and overlap with the Technical Standards Regulations. The Commission should make clear the record as to its present rulemaking (*i.e.*, for the Proposed Regulations, collectively and individually). An additional public hearing and additional time to comment should be granted to tribal governments to fully assess and participate by written comments, or through true (*see* Tribe's November Letter) government-to-government consultation,[14] with respect to the NIGC's overall regulatory initiatives as to class II gaming including the Proposed Rule and the Technical Standards Regulations. The consultation should include viable alternatives to the Commission's Proposed Rule as well as to the Technical Standards Regulations.

The Miccosukee Tribe of Indians of Florida respectfully urges the Commission not to adopt the Proposed Rule or the Technical Standards Regulations. As always, the Tribe remains willing to meet and to discuss with the Commission viable alternatives on matters of mutual import but any such alternatives must comply with the law and protect the Tribe's interests.

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[14] We note that the NIGC's alleged "formal consultation" with tribal governments on the Proposed Rule ended prior to the NIGC's proposed Technical Standards Regulations being published in the federal register for comments so that effectively no consultation has occurred on the Technical Standards Regulations or on the cumulative effects of both the Proposed Rule and the Technical Standards Regulations. As the NIGC has extended the comment period for the Technical Standards Regulations but not the Proposed Rule the NIGC has effectively precluded comments on the effects of the Proposed Rule and the Technical Standards Regulations, individually and collectively, including as to any alternatives now being considered by the NIGC.

Nothing in these comments or this letter constitutes or should be construed as a waiver of any rights of the Miccosukee Tribe of Indians of Florida under the law or otherwise. The Tribe reserves the right at any time to take any and all positions, including positions that are different, or even contrary, to those stated above.

Very truly yours,

Stephen B. Otto

* Via Electronic Mail Transmission

cc: Penny Coleman, Acting General Counsel, National Indian Gaming Commission*
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REGARDING	:	SUPPLEMENTAL COMMENTS OF MICCOSUKEE TRIBE OF INDIANS OF FLORIDA ON PROPOSED RULES CLASS II DEFINITIONS; CLASS II CLASSIFICATION STANDARDS, AND CLASS II TECHNICAL STANDARDS) COMMENTS ON "ECONOMIC IMPACT STUDIES"
PAGES	:	EIGHT (8) (Excluding Transmittal Sheet)
COMMENTS	:	SUBMISSION OF COMMENTS FOR MICCOSUKEE TRIBE OF INDIANS OF FLORIDA

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